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8
9 **UNITED STATES BANKRUPTCY COURT**
NORTHERN DISTRICT OF CALIFORNIA

10
11 In re:

Case No. 09-51900 ASW

12 BENYAM and PAULA MULUGETA,

Chapter 11

13
14
15 Debtors.

Date: December 13, 2011
Time: 2:15 p.m.
Place: Courtroom 3020

16
17 **MOTION BY ACTING U.S. TRUSTEE TO CONVERT OR DISMISS**
CHAPTER 11 CASE

18
19 PLEASE TAKE NOTICE that at the date and time specified above, at the United
20 States Bankruptcy Court, 280 S. First Street, Third Floor, San Jose CA 95113, the
21 Acting United States Trustee (the "UST") will, and hereby does, move the Court for the
22 entry of an order to dismiss or convert the above-captioned case pursuant to 11 U.S.C.
23 Section 1112(b).

24 In support of this motion, the UST requests the Court to take judicial notice of its
25 own records in the case. Fed. R. Evid. 201, made applicable to bankruptcy proceedings
26 pursuant to Fed. R. Bankr. P. 9017. Opposition shall be served and filed in accordance
27 with Bankruptcy Local Rule 9014-1.

28 The UST brings this motion on the grounds that (a) Debtors have failed to pay

1 post-petition taxes, and have run up a bill of \$331,000 in delinquent post-petition taxes,
2 and (b) Debtors have been in chapter 11 for over two and one-half years and appear
3 unable to propose a confirmable plan.

4 **I. FACTS**

5 On March 18, 2009, a Chapter 11 petition was filed by Benyam and Paula
6 Mulugeta ("Debtor). The Debtors own several real properties in the Bay Area: (1) their
7 residence in Palo Alto ("Harker"), (2) rental property on Harrison Street in Oakland
8 ("Harrison"), (3) rental property on Grand Avenue in Oakland ("Grand"), (4) rental
9 property located on O'Keefe in East Palo Alto ("O'Keefe"), (5) rental property located on
10 Chaucer in Berkeley ("Chaucer"), (6) rental property located on Brann Street in Oakland
11 ("Brann"), and (7) rental property located on Sevier Street In Menlo Park ("Sevier").
12 According to the Debtors' schedules, each of these properties has equity (see
13 Schedules A and D); however, it is unclear whether this is so at this time.

14 This case has been pending as a chapter 11 case for over thirty-one (31) months.
15 The docket indicates that the Debtors' primary activities in this case have been
16 defending against relief from stay motions filed by the various secured creditors, and
17 pursuing a sale motion for Harrison that never materialized. The Debtors have obtained
18 adequate protection orders or agreements with many of the secured creditors. However,
19 according to the most recent monthly operating report, they have needed to borrow or
20 obtain "gifts" from their son in the amount of \$236,468 in order to maintain these
21 payments, because the rents are insufficient to pay creditors. See September 2011
22 MOR.

23 The Debtors filed a plan and disclosure statement on July 26, 2011; the UST and
24 creditors filed significant objections to the disclosure statement; the Debtors have not
25 proceeded any further to obtain approval of the disclosure statement. In their recent
26 status conference statement, they assert that they hope to file an amended plan and
27 disclosure statement by the end of November 2011.

28 Debtors have only recently filed a motion to value the Grand property and strip a

1 lien. Motion filed 10/25/11, Docket #554. No other valuation motions have been filed,
2 which are prerequisites to confirming a plan in the event any liens are to be stripped or
3 modified.

4 Debtors have filed motions to sell the Harrison, O'Keefe and Grand properties
5 (see Docket #s 83, 143, 331, 486 and 488). None of these motions have produced a
6 sale.

7 On June 6, 2011 – more than two years after the Debtors filed their chapter 11
8 case – Debtors filed a motion to use cash collateral of the various lenders. That motion
9 has been continued to November 29, 2011.

10 The September 2011 MOR indicates that the Debtors have only \$1,828 in the
11 bank, and have delinquent post-petition taxes of \$331,400. The UST presumes that
12 these are primarily delinquent real property taxes. In any event, the dollar amount is
13 alarming. In addition, the only way the Debtors have been able to maintain the cash
14 flow on the properties is through borrowings or “gifts” from their son (in the amount of
15 \$236,468 through September 2011).

16 The Debtors have been in chapter 11 for over two and one-half years. While they
17 have tried hard, they do not appear to have the ability to confirm a plan in this case.
18 Rather, they appear to be parking in chapter 11, which has resulted in significant delay
19 (and expense) to creditors, when the reality is Debtors have no ability to reorganize.

20 **II. DISCUSSION**

21 A bankruptcy court has the authority to order a Chapter 11 case be converted or
22 dismissed if cause is shown and if the court finds that conversion or dismissal is in the
23 best interest of creditors of the estate. Specifically, § 1112(b) provides:

24 . . . [O]n request of a party in interest, and after notice and a hearing,
25 absent unusual circumstances specifically identified by the court that
26 establish that the requested conversion or dismissal is not in the best
27 interests of creditors and the estate, the court shall convert a case under
this chapter to a case under chapter 7 or dismiss a case under this
chapter, whichever is in the best interests of creditors and the estate, if the
movant establishes cause.

28 11 U.S.C. § 1112(b)(1) (Thomson Reuters/West 2009).

1 Section 1112(b)(4) of the Bankruptcy Code enumerates circumstances that
2 constitute cause including:

3 (A) substantial or continuing loss to or diminution of the estate and the
4 absence of a reasonable likelihood of rehabilitation;

5 (B) gross mismanagement of the estate;

6 (C) failure to maintain appropriate insurance that poses a risk to the estate
7 or to the public;

8 (D) unauthorized use of cash collateral substantially harmful to 1 or more
9 creditors; . . .

10 (F) unexcused failure to satisfy timely any filing or reporting requirement
11 established by this title or by any rule applicable to a case under this
12 chapter;

13 (G) failure to attend the meeting of creditors convened under section 341(a) ...
14 without good cause shown by the debtor;

15 (H) failure timely to provide information or attend meetings reasonably
16 requested by the United States trustee;

17 (I) failure timely to pay taxes owed after the date of the order for relief or to
18 file tax returns due after the date of the order of relief;

19 (J) failure to file a disclosure statement, or to file or confirm a plan, within
20 the time fixed by this title or by the court;

21 (K) failure to pay any fees or charges required under chapter 123 of title
22 28; . . .

23 (M) inability to effectuate substantial consummation of a confirmed plan..."

24 11 U.S.C. § 1112(b)(4).

25 The factors enumerated in 11 U.S.C. § 1112(b) are not exhaustive, and a court is
26 permitted to "consider other factors as they arise, and to use its equitable powers to
27 reach an appropriate result in individual cases." In re Consolidated Pioneer Mortg.
28 Entities, 248 B.R. 368, 375 (9th Cir. BAP 2000) (citation omitted).

29 **A. Debtors have failed to keep their post-petition taxes current.**

30 Section 1112(b)(4)(I) states that failure to timely pay post-petition taxes
31 constitutes cause to convert or dismiss a case. The Debtors have listed in their August
32 and September 2011 MORs a post-petition liability for delinquent taxes totaling
33 \$331,400. The UST presumes that this figure is primarily comprised of unpaid property

1 taxes that have not been paid since the Debtors filed their chapter 11 petition. In any
2 event, this failure to pay post-petition taxes constitutes cause to convert or dismiss their
3 case. It further demonstrates the inability of the Debtors to confirm a plan, since they do
4 not have the cash flow to keep taxes current.

5 **B. The Debtors have delayed creditors, and appear unable to confirm a plan**
6 **in this case.**

7 The Debtors have been in bankruptcy for over two and on-half years. They just
8 recently hired counsel (Marc Voisenat). They have proposed a plan, but after objections
9 were filed they have not pursued the plan any further. They have filed only one
10 valuation motion, although there are several real properties that they apparently wish to
11 keep. They just recently filed a cash collateral motion. There does not appear to be
12 much movement towards reorganization in this case. The Debtors have only been able
13 to meet their adequate protection obligations to secured creditors by getting money from
14 their son – i.e., the properties do not generate sufficient cash flow to service the debt.
15 Debtors have four liens against their personal residence (Harker) and cannot modify
16 those liens per section 1123(b)(5). There does not appear to be a reasonable likelihood
17 of rehabilitation; rather, the Debtors appear to be parking in chapter 11, with no ability to
18 reorganize.

19 Numerous courts have held that unreasonable delay in getting a plan confirmed
20 constitutes cause to convert a case to chapter 7. See, e.g., In re Desmond, 331 B.R. 42
21 (Bankr. N.H. 2005) (conversion warranted where debtor was unable to effectuate a plan
22 for almost two years since filing and continued delay was prejudicial to creditors); and In
23 re East Coast Airways, Ltd., 146 B.R. 325 (Bankr. E.D.N.Y. 1992) (where debtor had
24 filed its petition three years prior and was effectively out of business, conversion was
25 warranted as debtor had no reasonable likelihood of rehabilitation or ability to effectuate
26 plan and delay was prejudicial to creditors).

1 Accordingly, cause exists to dismiss or convert this case to Chapter 7.

2 **III. CONCLUSION**

3 Based on the foregoing, the UST requests the Court to dismiss or convert this
4 case to chapter 7 and for such other relief as the Court deems just and proper.

5 Dated: November 9, 2011

6 Respectfully submitted,

7 By: /s/ John S. Wesolowski
8 Attorney for United States Trustee